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International Protection of Cultural Property

Afternoon Papers of the Symposium held October 17, 1980:
Legal Protection of Cultural Property

For more than a decade, one of the most charged issues confronting international cultural politics has been the question of how best to defend the world's archaeological and ethnographic heritage against the menaces of modern civilization — the destruction caused by urbanization, agricultural development and environmentally-induced decay; and especially the looting of sites to supply objects for the world market. This latter question has been exhaustively debated, exposing in a relentless way the fundamental differences between attitudes, values, and national styles in the developed and the developing parts of the world, without reaching any significant resolution.

One of the foci of the debate has been the Convention established by Unesco in 1970 as an instrument meant to encourage cooperation toward the common goals of securing important cultural property against illicit activity. Despite its admitted failure to establish any international legal norms in the area, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Import, and Transfer of Ownership of Cultural Property has been the most important step taken on an international level to help solve the problem. The papers presented here, which concern domestic legal protection of cultural property, are devoted principally to evaluating the responses to the Unesco Convention in the United States, Canada, and Europe. A fourth paper considers the question of how to rebuild a cultural policy in China, a country that has lacked any cogent cultural direction for several decades, and whose current priorities reflect other more pressing concerns.

In 1979, I happened to be taking a walk near the historical Hua Qin Hotsprings on the outskirts of Xian and came upon an incredible neolithic site, Jiang Zhai. . . . Even as I marvelled at this magnificent find, workers were re-covering the pits with earth. I was told that the site was too large to be excavated at the present time because of shortage of manpower, and because the land belongs to the farmers in the area and is needed for growing food. Thus grain was again planted only several feet above an extensive neolithic community. Shirley Sun

In the first paper, Malcolm Wiener — a lawyer who was involved in the early stages of evaluating the Unesco Convention for the United States Department of State — gives an overview of the serious problems confronting the implementation of the Unesco Convention in the United States. He provides a detailed analysis of the similarities and differences between United States law and the concept of State ownership of antiquities advanced by many Third World countries. Mr. Wiener criticizes the "customs union" approach to controlling importation of cultural property, an approach which he feels "arises out of a basic difference between the common law of the United States and England on the one hand and the civil law on the other, which makes the approach necessary for European civil law jurisdictions but not for us." Mr. Wiener suggests that American law already has a mechanism for settling cultural property claims through title suits, making unnecessary the intervention of the Customs authorities, whom he describes as notoriously unfamiliar with and untrained for intervention in cultural disputes. Mr. Wiener pleads for a realistic response to the antiquities looting problem, directed at saving sites that are important to future research and objects that are of outstanding relevance to the national patrimony of the source country.

Since these papers were delivered, the United States has in fact enacted the implementing legislation which is the subject of Mr. Wiener's discussion. This action has not, however, brought an end to the debate about how the legislation will work. Furthermore, recent events have brought the "customs union" approach to stopping antiquities traffic under new scrutiny, and made the subject more controversial even than it was in 1980. A reading of Mr. Wiener's paper will bring the issues at hand into perspective.

Ian Clark, former Secretary-General of the Museums of Canada, discusses that country's response to the Unesco Convention. He outlines the formulation of the 1977 Canadian Cultural Property Export and Import Act, which is the only domestic cultural property legislation that a major developed country has passed in the last decade. Mr. Clark describes Canada's efforts to take into account the respective needs and viewpoints of dealers, collectors, and Canadian institutions, while advancing the concept of establishing a controlled national cultural heritage. Mr. Clark discusses the concept of fair market value, and how it is established under the legislation, and raises a number of practical issues whose resolution the drafters have attempted to foresee in advance.

Mr. Clark closes by reviewing statistics concerning cases processed under the Act. Recent reports of the Export Committee show that, while the statistics vary slightly from year to year, the application of Canada's law has remained constant, providing a structure within which the market can comfortably function.

Staf Dockx, a young Belgian lawyer, picks up the thread of Mr. Wiener's comments and discusses a new instrument proposed by the Council of Europe to bridge the differences in European domestic law as it attempts to combat art crime and facilitate the recovery of cultural property. Mr. Dockx presents a lengthy explanation of the philosophy behind the European Convention on the Suppression of Offenses against Cultural Property, which he believes might provide an alternative route to the Unesco Convention in combatting cultural property offenses. This instrument operates within the context of criminal rather than civil or common law. In Europe, the problem of art theft has been seen to be aggravated by the proximity of many different jurisdictions whose laws do not uphold a common set of principles. The European Convention would attempt to apply an "international criminal law" approach to the resolution of these differences. Since the Convention gives first priority to matters of restitution, its scope could conceivably be expanded to control restitution of cultural property originating from outside the European community. The international law concepts it advances are then seen to parallel the Unesco Convention effort, of which Mr. Dockx is highly critical.

Finally, Shirley Sun, a Chinese American with considerable experience in bilateral cultural exchanges between the United States and China, puts the legal concepts discussed by the previous speakers into the context of reformulating a cultural policy for a country whose system of values is changing. She discusses how, in a country whose motto has become "let the past serve the present," regional activities to protect monuments and sites have grown into a kind of informal national policy. At the same time, she discusses the active program of archaeology that China has conducted in the last decade, the stunning products of which have come to serve as the country's cultural ambassadors, in a way that in a previous era the products of an active market stimulated Western interest in the Orient.

We present these papers with the regret that, due to unforeseen and unavoidable circumstances, their publication has been delayed until now, but with the conviction that the information they contain will be as fresh and relevent to our present concerns as it was in October 1980. *Bonnie Burnham*

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Papers of the morning session of this symposium, entitled World Cultural Heritage Update.

Implementing the Convention on Illicit Traffic in Antiquities: Proposals, Past and Prospect

by Malcolm Hewitt Wiener

My subject is how we got where we are today, and then how to leave where we are today. I say "we" because all of us deeply interested in man's past and in his greatest esthetic achievements are in one respect part of a single community. It seems to me that unless we act in that manner and reach a consensus on the issues posed by the Convention, we all stand to lose more than we gain.

My direct involvement with the problem of traffic in antiquities lasted from 1970 to 1974. During this period it was my lot, as General Counsel of the Archaeological Institute of America, to counsel and represent the Institute and to advise the Department of State on a number of troublesome questions. My aim then was not only to see if something useful could be accomplished, but also to prevent, if possible, the various constituencies of the Archaeological Institute — field archaeologists, art historians, museum curators, and lay members, including many collectors and dealers — from devouring one another. After being dragged from retirement for the day by Ed Weisl, it was interesting to me to see what has happened since, or perhaps more accurately, how little has happened since.

First, a brief review of the past ten years: A draft Convention was first circulated by UNESCO in 1969. Modifications were made in response to U.S. protests that the draft was too sweeping, and the final treaty was adopted by the member states on November 14, 1970. The following month the Archaeological Institute of America overwhelmingly voted its support for the Convention. Many prominent museums and the American Association of Museums voiced support as well.

The President of the United States signed the UNESCO Convention in 1971 and sent it to the Senate for ratification. After one false start, when scheduled hearings were abruptly cancelled by the Senate Foreign Relations Committee in order to act on the nomination of Henry Kissinger as Secretary of State, hearings were held, and on August 11, 1972 the UNESCO Convention was ratified by the Senate of the United States by a vote of 79 to 0. A provision was added at the last moment, however, that the Treaty would not be self-executing under the supremacy clause, as many treaties are, but would only take effect when certain technical implementing legislation had been adopted by both Houses of Congress. And that, in essence, is where we are today.

The 7 1/2 years since have seen endless negotiations, drafting, redrafting, mark-up sessions, and disputes, sometimes bitter, between opposing viewpoints, with great expenditure of time and, for some, of money in the form of legal fees and political contributions. It should be noted that in 1978 implementing legislation *was* in fact passed by the House of Representatives, but was blocked in the Senate as a result of the strenuous efforts of the American Association of Dealers in Ancient, Oriental and Primitive Art. Since the legislation was not adopted by both Houses of Congress, it died, and now it must again be passed by both Houses in the same session of Congress. The most recent legislative markup meeting was held on March 20, 1981, and the issue of what sort of evidence for legal acquisition of an object on the "endangered objects list" should be required of anyone seeking to import it was vigorously discussed. No bill was ever reported out of committee, but Ms. Wignot on the House subcommittee staff tells me that a bill will certainly be introduced in the next Congress.

What is clear is that the question of implementing legislation will not go away. First of all the United States, after insisting on certain changes in the UNESCO Convention as a condition of adherence, has signed and ratified the Convention, thereby creating, in the eyes of the Department of State at least, an obligation to adopt at least some sort of implementing provisions. Moreover, pressure continues to be exerted by the countries whose sites are being looted daily. Finally, we note the persistence of a number of dedicated field archaeologists. As one of them recently commented, at the least the legislative effort serves as "an excellent means of consciousness-raising." If the archaeological community should ever learn how to target its letters to Congressmen or the news media, it might even prevail. And I predict that the incoming President of the Archaeological Institute of America, Prof. Machteld Mellink, and the Vice President, Prof. James Wiseman, will be more vigorous in this regard than some of their predecessors.

But no one interested in the history of mankind can be indifferent, for the record of man's past is threatened as never before. The combined consequences of deep plowing, of new roads into remote areas, of increasing urbanization, of international air and rail travel with guest workers by the millions coming from art-exporting countries to art-importing countries, of high prices on the art market, of well-financed tomb robbers supplied even with helicopters, threaten sources of data about such basic questions as the origins of writing, of agriculture, of metallurgy, and of towns and cities. The argument was recently made by a dealer that in view of the destruction of sites through urbanization and deep plowing, it hardly pays to worry about looting. Surely, the better view is that it is now all the more important to save for excavation the critical sites which remain.

On the other hand, it would be a rash person who would bet on anything very close to the present legislation actually ever being passed, given the political skill shown to date by the dealers association, and at least one museum, in opposition. In short, what we have is a standoff, reminiscent of nothing so much as the Sartre play, *No Exit*.(1)

What, therefore, is the prospect for the future? Can we together find any way out of this mess? Rather than attempt to go line by line through the Convention and most recent proposals for implementing legislation, I think it more fruitful to consider the central problems that have emerged over the last 10 years, and ask where we stand. I make out four tough nuts to crack:

1. The lack of interest to date in other "importing" countries, whose purchases can certainly sustain the present level of tomb-robbing, even if United States institutions and collectors abstain.
2. The lack of cooperation and amount of corruption in some "exporting" countries.
3. The difficulty of establishing provenance for some objects, either because they can come from one of many countries, or because false documents of provenance are deliberately created.
4. The difficulties inherent in placing the burden of implementation on the Customs Service.

There is no use pretending that these are not serious concerns, any more than there is any use pretending that the history of man's past is not seriously threatened. I'd like some day to hold a symposium with the usual roles reversed, with the archaeologists challenged to deal with these problems, and the dealers required to say what practical steps they would recommend to reduce the pillage.

Let us see what we think about these four issues, and what solutions the proposed implementing legislation offers.

First, the "other countries" problem, about which we've heard so much today. It's clear to me that the U.S. cannot accomplish much acting alone, at least with regard to Old World, Oriental and African art. (Whether Maya stelae are a special case, given the proximity of the American border, I leave to others more knowledgeable than I, but I have my doubts. I apologize, incidentally, for using mostly Old World examples — it's not that I'm not interested in New World problems or African ones, just that in those areas I'm even less knowledgeable than I am about classical antiquities). This is surely the critical problem, for there is obviously sufficient "effective demand" in other countries. "Effective demand," incidentally, is a term of art in economics which simply means desire plus money. There is plenty of both in Western Europe, Japan, and South America. Are the other importing countries prepared to do anything? It's sometimes said that Germany and perhaps England are waiting on the United States and may follow our lead, but I've never heard the same said of Switzerland. On the other hand, I'm not certain anyone has ever actually raised the question in Switzerland. What, for example, is the view of Dr. Olivier Reverdin, Professor of Greek at the University of Geneva, who (if memory serves) while a working classicist became successively a Senator, the Leader of the Liberal Party in Switzerland, a Member of the Council of Europe, and President of the Council? And would it not be more useful to talk to Prof. Reverdin about what might be acceptable to Switzerland than to continue to discuss these issues among ourselves?

It does seem to me that if what were proposed was limited to the so-called "emergency measures section" — that is, if the other major art importing countries could agree on limited bans on importing or acquiring title to objects from known areas under excavation or from areas where excavation is about to begin that are of primary importance for new understanding of man's past, the Swiss might agree as well.(2) Under this approach, we would at least have been able to protect Hacilar, Ban Chiang, or Ebla material, for example, while the sites were or are under investigation. (As you may know, about 150 of the vitally important hoard of Ebla tablets were stolen, and some sold by a few dealers to collectors in various countries including our own.)

The manner in which the implementing legislation deals with the "other countries" problem is interesting. The President is permitted to ban the importation of specific material for a limited time, after a finding by an advisory committee composed of archaeologists, museum representatives, dealers and public members, in which the museum representatives and dealers have a majority, that such action "is likely to be effective in protecting" the material in question. Since anyone with his head screwed on tightly understands that action can't be effective without the full and effective cooperation of both the country from which the material is coming and the major importing countries, clearly international agreement as a prerequisite for U.S. action is implied. Further, I expect that what is now clearly implicit will be made explicit in the new version of the legislation to be introduced next session.

This proviso is also relevant to the second problem noted: lack of cooperation and sometimes corruption in some of the art-exporting countries. I suppose each of us would have his favorite horror story. Perhaps my favorite involves an important piece stolen from an excavation depot before it could be studied, which was recognized when it appeared in the sale catalogue of a leading London auction house. The excavator, a distinguished member of the staff of a great museum, was contacted. His response was immediate: "Please be quiet. It's a major loss, but the thief was the chief of the guards at the site, and his relative is the official of the service who grants or denies our excavation permits." And Professor Gorman in his most thoughtful paper pointed out that the first pillage of the critically important area of Ban Chiang occurred not at the behest of some gnome of Zurich or Malraux of Madison Avenue but through the efforts of a dealer in Bangkok, soon supported by wealthy and politically influential Thai collectors.

Many countries are simply overwhelmed by the sums available for bribes. (Before we begin to feel too superior, however, it's worth noting that in a recent poll of FBI agents as to what they considered the most serious law enforcement problem in their areas of the United States, 71% replied "corrupt state and local officials.") On the other hand, certain countries such as Greece have made vigorous efforts to prevent pillage, to the point where some of my friends in the Greek Archaeological Service complain that a great amount of their time is spent in testifying in court. Surely one thing we can learn from the comments made here today is that countries differ: Thailand is not Greece, and Greece is not Egypt.

The most relevant feature of the proposed legislation with regard to this problem is that the United States response is determined by professionals from our community, rather than through the political process, which would create the possibility of acquiescence to a foreign country's claims because of foreign policy concerns not related to attempts to preserve the record of the past.

The third critical area is false provenance. We are all familiar with pieces which come from "old Norwegian collections," or come with apparently ancient photographs and a sworn statement from an impoverished former Polish nobleman saying they have been in his family collection for 50 years, or come from the widow of distinguished collector "X," who "launders" the pieces for a while before they are sold by dealers as coming from the "X" collection. A friend of mine was recently offered a piece in Switzerland on the following terms: "For the piece, $90,000. With provenance, $120,000."

One should not be surprised at this development. When customers want pieces, dealers sell pieces. When customers want provenance, ...

This is indeed a most difficult problem, with two unpleasant side-effects. First, it makes the scholar's job more difficult. Second, since under current proposals a sworn import declaration would be required,

unscrupulous foreign dealers out of the normal reach of U.S. law might have little compunction about committing perjury, giving them an unfair advantage vis-à-vis American dealers. At least American dealers would want foreign dealers as intermediaries. No wonder the nature of the declaration to be required is the current hot issue in Washington! I see no way out of the problem, given the current "customs union" approach. Rather, this also points, in my view, to the need for a new approach.

Even without false provenance, however, it may be impossible to establish the country of origin — that is, the country of excavation. For a Hacilar or Ban Chiang pot, this is easy; for a Greek or Roman object, not so. We are all familiar with cases where the Customs Service has made strenuous inquiries at the behest of a foreign government, consuming vast amounts of the time of those involved with no ultimate result.

And this raises my fourth, final, and most vexing problem, the role of the U.S. Customs Service.

Those who, as museum curators, dealers or collectors, have had to deal regularly with the Customs Service, recoil emotionally as well as intellectually from any proposal that appears to increase Customs' sphere of activity. Nor is this duty wholly welcome to the Service. I recall how, in the early discussions of the Convention, the representative of Customs asked what we proposed to do about the importation of copies, and how we expected their inspectors, who are high school graduates with no training in art history, to tell the difference between original pieces and fakes or copies. It seems clear to me that any approach that would rely on Customs as its effective enforcement mechanism is illusory. At best (or at worst) this approach relies on its "in terroram" effect.

The true impact of the "customs union" approach is rather to affect title. Once something is declared contraband, no museum or collector can acquire clear title. But if that is the case, why bother with Customs, instead of aiming at title directly? How did we get into this customs declaration controversy in the first place?

In my view, what I've called the customs union approach arises out of a basic difference between the common law of the United States and England on the one hand and civil law on the other, which makes this approach necessary for European civil law jurisdictions but not for us. Take the most elementary situation in property law. A thief steals a car and sells it to an unsuspecting purchaser. The original owner discovers the whereabouts of the car and sues the innocent purchaser to get it back. In the meantime the thief has disappeared with the money. Our property law holds that as between the two innocent parties, known as the "true owner" and the "bona-fide purchaser for value," the "true owner" prevails. This principle is contained in the saying "a thief cannot convey title." There are, of course, many exceptions to the rule, involving such things as carelessness by the true owner with regard to indicia of title, or sale by a store which sells similar merchandise in the normal course of business, but the basic principle is clear. In some civil law jurisdictions, however, the innocent purchaser would prevail, particularly if an object is acquired at an open auction. In other words, in those jurisdictions a customs union-contraband goods approach is needed to get the objects stolen from a museum or looted from a protected archaeological site back to the country of origin and out of the hands of the Swiss purchaser, for example, whereas an American purchaser would normally not acquire good title in the first place, as against the true owner of the property.

This of course raises one of the great hoary chestnuts in this whole debate, namely whether an art-exporting country can claim title to objects which were previously unknown to it. That is to say, everyone agrees that there is no problem about objects which were in the inventory of a museum or an excavation depot and were stolen from it, but what about objects which were looted from a tomb or site or merely found in the course of plowing, and are then sold abroad? Under the laws of many foreign countries any antiquity found in their soil is the property of the state. However, one frequently sees the argument, in briefs by counsel for the dealers association and in other places, that American law knows no such "attenuated and metaphysical" concept of property, and that to recognize such a property right would violate common law concepts of property. I assert that that statement is pure rubbish; and if you don't believe it, I ask you to consider the following case. Suppose some pot hunter went on federal land, state land, or Indian land, and stole a Mimbres pot. Would we recognize a property right in the government? Or take the situation, reported not long ago in the *New York Times*, of the 12.4 million acres of U.S. Parks Department desert in California. Recently posts were created for 12 federal agents to protect this land because it contains valuable cacti and minerals subject to theft. According to reports cactus rustlers were removing cacti and selling them (for up to $400 each), particularly in Japan where these California desert cacti are especially prized. Various types of ornamental rock were also said to make their way to the same destination. You will recognize at once that this is the direct obverse of the common situation. Here *we* are the art-exporting country, with artifacts taken from our soil and shipped abroad. I put it to you that it would never dawn on anyone that the people removing these objects were not stealing government property, or that the government could not recover the property from a bona fide purchaser. As you know, there has already been one conviction and jail sentence for stealing American Indian artifacts from a national park.

A distinction is sometimes suggested on the basis that the American laws in question deal with only some of the national territory, whereas foreign laws typically deal with the whole of the country. I suppose one may put aside for purposes of the jurisprudential question the fact that the total acreage of all the federal, state and Indian lands in this country put together exceeds the total size of Guatemala or Costa Rica. Even were that not the case, I somehow doubt that any compelling legal distinction could be drawn based on the difference in the amount of territory covered by a law.

But let us assume that foreign laws in this regard differ somewhat from American law. Does that mean that the American courts would not listen to a claim by, let us say, the government of Italy or Turkey, backed by adequate proof, that an object previously unknown to that government had been looted from its soil and should be returned to it? If our courts gave effect to the laws of foreign countries only when those laws were identical to American laws, the whole subject of conflict of laws would not exist, and a number of law professors would be out

of work. There is, of course, a doctrine that U.S. courts will not enforce a foreign law which we find to be unconscionable. In my day in law school, the example always given was of a contract for chattel slavery in a country which still permitted slavery. Surely no American court would order a slave who had escaped returned to his master. But is a foreign law which recognizes in the government title to antiquities found in *any* part of its soil, in contrast to United States law which recognizes government title to antiquities found in *certain* parts of its soil, so different and repugnant to our notions of justice as to be unconscionable? Of course not, and no one seriously thinks otherwise. If they ever had, presumably the decision of the Fifth Circuit in McClain has persuaded them. And finally, if this were a real problem, then all the Government of Thailand would have to do is declare Ban Chiang a National Park!

If that is the case, why don't foreign governments simply bring suits in our courts today, without any UNESCO Convention and without any implementing legislation, to get their antiquities back? Indeed Guatemala has done so in the case of Mr. Hollinshead. Typically, however, there are two difficulties. The first is that in cases involving Greek vases or bronzes, as we've mentioned, it may be difficult to know from what country they come. The second is that relatively little material comes to this country these days directly from the country of origin. At least in the field with which I'm familiar, namely classical antiquities, many pieces come through Switzerland, for example. If an American museum, dealer or collector buys a piece in Switzerland where, let us assume, the law vests title in the innocent purchaser, and a claim is made by, let us say Turkey, for return of the piece known to come from there, would an American court apply the law of Turkey, or would it apply the law of Switzerland, where the piece was purchased? That is, as we say, a nice question.

There is also the problem of proof. In a typical case, for example a classical bronze statuette purchased in Switzerland, there is no proof as to the country of origin. But in the cases we have been discussing — the Hacilar or Ban Chiang pot, the Ebla tablet — I think a court would take judicial notice of the likelihood that the piece in question came from Turkey or Thailand or Syria, since these objects did not travel in antiquity, as far as is known. At least the court might reasonably take the view that the evidence is sufficient to make out a *prima facie* case, and shift the burden of proof to the defendant to show where he got the object that he claims has been acquired legally. I might mention, *en passant*, that I once made this observation to a prominent New York dealer in Pre-Columbian art, who responded by showing me a lovely jade which he said could clearly be traced to a small geographical area, half of which lay on the Mexican side of the border and half on the Guatemalan side. I couldn't resist replying that the common law is flexible enough to accommodate joint plaintiffs, and if I were advising the governments of Guatemala and Mexico I would tell them to bring a suit jointly for the recovery of the jade, agreeing that it would be kept part of the time in a museum of one country and part in the other.

In summary, then, what conclusions can be drawn from what has been said? First, if my notion of the current state of the law is correct, it may be possible for certain art-exporting countries to protect their most critical sites without any treaties or implementing legislation, simply by resort to our courts. This is true, however, only for those early sites with artifacts that did not cross present national boundaries (or for cases where two adjoining countries can act jointly). However, it should be noted that these, in fact, are the most critical sites for understanding man's past. I appreciate, of course, that it would be nice to know whether certain Athenian pottery workshops had commercial links with particular Etruscan centers– that is to say, to stop the traffic in material looted from Etruscan tombs, but this question is of less critical importance to our overall understanding of man's past than the questions posed by sites such as Hacilar, Ban Chiang, or Ebla.

Second, museums, dealers and collectors are not necessarily safe now, from the legal standpoint, in acquiring an object from a known country. Indeed, purchasers may be better off under precisely drawn implementing legislation defining what is forbidden than under present law, if "exporting" countries become more assertive as well they may. Everyone has an interest in resolving these issues. Moreover, no one's livelihood is threatened by limitations on traffic in Hacilar, Ban Chiang, or Ebla material.

Third, no effort can be successful without the real and active cooperation of the country of origin and the major "importing" countries. Strenuous efforts by us in the absence of such cooperation will only result in further productions of the theater of the absurd.

Fourth, there presently exists neither international intellectual consensus nor effective means to prevent *all* traffic in objects clandestinely obtained. A Greek vase purchased in Munich or Zurich, previously unknown but with a letter asserting it comes from an "old collection" may serve as our archetypal example. Where in fact it really came from, and when, is usually difficult to determine. (Unless, of course, there is a sherd missing, and the Italian or Greek authorities produce the missing sherd. The YBEHTOS Art Index has recently noted an increase in the premium paid for vases which are complete.) At present the other art-importing countries are not prepared to ban all trade in antiquities.

Fifth, all parties to this ongoing controversy have something to gain by agreeing to seek international support for efforts to protect known sites of primary importance.

I close with two ancient legal maxims. The first teaches that there are many wrongs for which there is no legal remedy. The second says that the law cannot do everything, which does not mean that it cannot do anything.

1. The legislative record is not entirely barren. In 1970, the United States signed the "Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties." 22 U.S.T. 494. However, that Treaty was not designed to impose import restrictions, but rather to provide for assistance by the United States government in the recovery of such objects as are determined to be "of outstanding importance to the national patrimony" of Mexico (Art. 1). Whether a particular object is covered by this definition, and hence is protected by the Treaty, is to be determined by agreement between the governments, or failing agreement, by a panel of experts appointed by the governments (Art. 1, Sec. 2). This

approach to the problems of implementation will be considered further below. In 1972, Congress enacted a statute entitled "Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals," 19 U.S.C. Sec. 2091-2095, which prohibits the importation of such material unless the country of origin certifies that exportation was not in violation of that country's laws. The statute is expressly limited to any stone carving or piece of wall art that "was an immovable monument or architectural structure or was a part of, or affixed to, any such monument or structure," or any fragment or part thereof.

2. Consider that although Switzerland traditionally places a high value on the right to privacy in financial dealings and has made disclosure by banks of information about customer's accounts a crime, nevertheless by special legislation the Swiss have permitted banks to make information available regarding accounts which may have assets seized by the Nazis, and accounts used by organized crime.

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The Cultural Property Export and Import Act: Legislation to Encourage Co-operation

by Ian Christie Clark

On September 6, 1977 the Cultural Property Export and Import Act was proclaimed into force in Canada. The purpose of this federal legislation was to better ensure the preservation in our country of the best examples of our cultural, historic and scientific heritage.

The method of control proposed in this act was designed to ensure the co-operation of the collector-dealer fraternity in Canada without which co-operation, experience in other countries has shown, no system of export control will work smoothly, efficiently and fairly. Thus the legislation was based on the following principles:

1. The state must retain the right to prevent the export of objects of high importance in suitable cases by establishing a delay period;
2. In every case in which export is prevented, the owner must be assured of an offer to purchase at a fair price;
3. Offers to purchase should be related to the market price wherever the conditions admit of a genuine and reasonable market price being arrived at.

Prior to its consideration by Parliament, the substance of the proposed legislation and the control system it proposed were the subject of consultations with provincial governments. Prior to its tabling in the House of Commons it was also discussed in principle with representatives of the various groups at interest, the custodial institutions, collectors and the trade. As soon as the bill was introduced, these groups in the private sector had an opportunity to consider the proposal in detail and as a result of suggestions received during the continuing consultation process, amendments were proposed and adopted during its consideration by Parliament. If all groups at interest found some aspects of the legislation with which they were not in total accord, there was general agreement that the legislation as a package was fair and had been designed to protect the legitimate interests of all concerned.

Most people involved with heritage matters in Canada would agree that a number of important items had left the country over the years which, if Canadian public authorities and institutions had been in the position to purchase them, or even if they had been made aware early enough of the seller's intentions to dispose of them abroad, would have been kept in Canada. The Cultural Property Export and Import Act now ensures, on a systematic basis, that an object of importance does not slip away unnoticed and that an opportunity will be provided for considering whether it should be retained in the country or not.

The government's approach had been to devise a system of control in terms of Canada's needs but based upon the experience of other countries, particularly the United Kingdom and France, to ensure that appropriate steps could be taken, following their example, so that our national heritage would be better preserved for future generations.

The legislation therefore was conceived as a package involving a balance of restrictions and incentives as outlined in the Act and regulations. The success or failure of the legislation would depend on the successful implementation of each of its component elements.

Exclusions from Control

The concern of the drafters of the legislation was to limit control to a minimum. After examining export control systems in force abroad, it was concluded that all have some inherent defects which become greater as the number of objects potentially subject to control increases. Whatever arrangements were decided upon would have to be administratively practical. Any attempt to be over-meticulous would defeat itself. A workable system of export control must confine itself to limited, well-defined categories. Control has been least effective and most irksome when it deals with objects not of the ffrst order of importance.

The legislation envisaged, therefore, the control of objects which are in the National Treasure category. The intention was to catch those things that should be controlled without making the net so tight that too much is caught and the system becomes oppressive or unworkable, or both.

The application of broad criteria of age and value offers the simplest and most efficient way to affect control. Age, for example, is a factor that helps to establish rarity; value, on the other hand helps to establish quality. Thus the control list establishes the basis upon which the system operates. It sets the ground rules. However, the Act allows for changes to be made in the control list in response to the upward movement of prices on the market, or in cases where the control may have been originally set at too low or too high a price. At its simplest, the idea is to apply control to objects above certain age and value limits and to make no attempt to exert control over objects beneath these limits.

The Act exempts from control objects that are less than fifty years old and objects made by a living person.

Of course, there are national treasures to be found in Canada that are less than 50 years old. But to try to safeguard them by the control system being proposed was judged to be both impractical and undesirable. First of all, it would considerably increase the number of objects to be scrutinized. It is also worth pointing out that any control of trade in objects of less than 50 years of age might discourage the vigorous sort of two-way traffic which brings recent, important works of foreign provenance into the country in exchange for those that leave it and which testify to Canada's growing artistic reputation abroad.

Questions have been raised concerning the application of the control system to objects not of Canadian origin. What are the principles that the Act incorporates in the case of objects imported to Canada, which owners wish to export?

As in other countries which have adopted similar legislation, objects forming part of the cultural heritage are defined to include not only indigenous objects but foreign made objects. However, the British precedent was followed of requiring foreign cultural property to acquire "citizenship" through time and association with our country. To be subject to control, objects must be on the control list, but permits are issued forthwith by the permit officer without reference to an expert examiner for objects which have been in Canada for less than 35 years.

And to repeat, to be subject to control, the artist must not be living, and the object must be at least fifty years old.

The 35-year rule should not discourage collectors from importing objects from abroad in the future. On the contrary, those who are astute stand to gain by doing so, if they choose wisely and well, as an outstanding foreign object will be eligible for tax exemption in the future in the case of successful referral to the Board when an owner and institution are negotiating a gift or sale — even when export is not

involved. Then, too, 35 years represents a lifetime of collecting for those importing cultural property from abroad, during which time they will have complete freedom to export, as a permit will be issued forthwith by the permit officer in the same way that temporary permits are issued.

The Control System

Under the Canadian system the export of cultural property is regulated by reference to a control list establishing categories and age and value limits. The departure from Canada of an object falling within the control list can be postponed if, as the result of an appeal by a person to whom an export permit has been refused, an independent review board judges that a reasonable delay period should be created. This enables interested public authorities and custodial institutions in Canada to purchase it at a fair market price. If the object is not purchased within the time limits of the delay period, an export permit is granted.

The regulatory system is administered across the country through 16 customs ports where 32 customs officials have been designated as permit officers. These permit officers act on the advice, as necessary, of some 343 locally designated expert examiners.

Normally, custodial institutions in reasonable proximity to the customs office or offices selected in each province to issue export permits provide the source of the expert examiners, such as local museums, art galleries, provincial archives and university libraries.

If the export is for some temporary purpose (such as exhibition, loan, authentication, restoration, research purposes, etc.), the permit is issued forthwith by the permit officer. Temporary permits are also granted forthwith to Canadian residents temporarily residing abroad. If the permit concerns the return of a loan made to an institution or public authority in Canada by a non-resident, the permit is also issued automatically and expeditiously by the permit officer.

In the case of permanent export, if the permit officer, who makes no artistic judgements under this legislation, agrees that an object is, in fact, subject to control by reference to the control list, he refers the application to a local expert examiner; otherwise, he issues the permit. If the expert examiner decides, after applying the criteria set forth in the act for judging the significance and national importance of the object, that the permit should be granted, he so advises the permit officer who will immediately issue an export permit.

If the expert examiner decides that an export permit should not be granted, the permit officer will not issue it and the applicant can either keep his object, try to sell it in Canada, or he may appeal to an independent Review Board.

The Review Board reviews the decision and applies the same criteria to determine whether, in its view, the object really falls in the category of outstanding significance and national importance required by the Act. If the Review Board decides that it does, and concludes that an offer to purchase the object might be made by an institution or public authority in Canada, it may establish a delay period of up to six months. If it decides that it is not likely that an institution or public authority in Canada would be interested in purchasing the object or, in the event that it has established a delay period and no fair cash offer to purchase the object has been made within that time, it directs that an export permit be issued. There is a procedure for determining what is a fair cash offer to purchase in the event that the parties cannot agree.

I should perhaps mention the provisions governing the general permit and the open general permit, which are ministerial permits defined in the regulations and have specific purposes.

The general permit, really a bulk licence, can be issued to a reputable dealer to alleviate undue hardship or interference with his business. Such a dealer, on application, and in accordance with agreed terms and conditions, is permitted to export objects which, although they might technically fall within the control, are not in themselves of such importance that an export permit would not be issued if applied for. Of course, this privilege can be withdrawn if it is abused.

The open general permit refers to a type of permit applicable to all persons, and is published in the Canada Gazette. This type of permit, in effect, creates an exception to the control list while it is in force. For instance, a particular class of object subject to control might be in abundant supply and the ability to exempt such a particular class of objects for a period which might be limited, assures the necessary flexibility in the control system.

The system of control, therefore, is seen to be fair. Its operation only affects objects considered to be of outstanding significance and national importance and so it does not seriously interfere with normal trade nor infringe unduly upon personal rights. It does not expropriate or confiscate property. If a person has applied for an export permit for an object considered to be of national importance, he either obtains a fair price for the object or at worst, from his point of view, his intention to export is delayed for a period of a few months in order to provide time for Canadian custodial institutions and public authorities to examine whether the object can be purchased at a fair price and thus retained in Canada.

There can be no doubt that the legislation demands close co-operation between all of the groups at interest. Dealers as well as collectors must work closely with the private and public institutions which have the responsibility of preserving the Canadian heritage. This point cannot be overemphasized. Any system of export control has a public relations function, and it also has the responsibility of setting the rules of the game. We believe the very fact of the legislation, with the incentives it contains, has encouraged the communities at interest to work together more closely.

If the system could work ideally, the legislation itself would become superfluous. At each stage of the control process, which as an end result is only creating a delay period in order to allow a fair cash offer to be turned up, there will be opportunities for the potential exporter and an interested institution to reach some kind of agreement.

Legislation which creates delays and ties up capital will not gain acceptance. However, dealers and collectors are not an element of the population at which the legislation was aimed as if they were singled out as a group that had to be controlled. On the contrary, the success of the system depended on their active co-operation. This co-operation would not come easily if they, as a group, were constantly faced with a conflict between their own natural tendencies of wishing to see the best elements of the heritage preserved in Canada and their pocketbooks. The system implemented

provides funds to assist in the preservation of national treasures which have been ruled as such by the Review Board.

Funds are voted by Parliament annually under the Act so that Canadian institutions throughout the country can be assisted in purchasing national treasures threatened by export and for which the Review Board has created a delay period.

In the period September 1977– October 1st, 1980, 306 export permits were processed of which 57 permits were issued on the advice of an expert examiner, 3 were denied on the advice of an expert examiner but were not appealed, 8 export permits were subsequently issued by the Canadian Cultural Property Export Review Board on appeal, and 20 export permits for permanent export were denied by the Review Board. Of the cultural property subject of the 20 export permits denied by the Review Board, all were purchased at the declared fair market value by Canadian institutions. In 18 cases out of the 20, purchase, on the advice of the Review Board, was facilitated by grants from funds made available under the Act.

Canadian Cultural Property Export Review Board

The body responsible for regulating the export of cultural property subject to the Act's provisions is the Canadian Cultural Property Export Review Board, which is appointed by Order in Council. In addition to the Chairman, there are ten members, two of whom represent the public interest while the balance represents in equal proportions public collecting institutions on the one hand and private collectors and dealers on the other.

The intention was to set up an independent body made up of individuals having a recognized knowledge about, and interest in, the Canadian heritage. The Board is considered a body of professionals with access to people employed in custodial institutions, or who may have recognized expertise outside that community, who have the technical and special knowledge to assist it in any matter in an advisory capacity.

The first duty of the Board, as we have seen, is to review appeals from applicants who have been refused export permits for permanent export by expert examiners.

The second duty arises when an owner and a Canadian institution cannot agree on a price for an object for which the Review Board has created a delay period. In such a case the Board, calling upon the advice of outside valuation experts, determines the amount of a fair cash offer. If the institution in question accepts this evaluation and offers to purchase the object, but the applicant does not accept it, an export permit will not be granted and the owner must wait two years before applying again for an export permit. If the applicant accepts the evaluation but no institution is willing to purchase the object for the amount of the fair cash offer, then the Review Board instructs the permit officer to issue an export permit.

The third duty of the Review Board arises out of the amendments to the Income Tax Act in Canada.

The Incentive System

In addition to outlining a system of control, the Act provides tax incentives. The Income Tax Act in Canada was amended in order to give Canadian institutions and public authorities a competitive "edge" in negotiating for important works, and to encourage the collector to "do business" with the custodial community in Canada.

The amendments to the Income Tax Act are included in the Cultural Property Export and Import Act which exempt from capital gains tax certified cultural property disposed of to designated institutions or public authorities in Canada. Since the Act came into force, amendments have been enacted by the Canadian provinces in the area of inheritance taxes and succession duties so that provincial tax law in the matter of capital gains is now consistent with federal tax law. In addition, gifts and bequests of such property under the Act are now deductible up to 100% of income. This amendment placed all designated institutions and public authorities on the same footing with regard to the tax incentives. This enshrined the principle of the donor's right to choose the repository for his collection wherever in Canada that repository was located and whatever its jurisdiction.

The tax exemptions are not restricted to cases where owners are attempting to export national treasures or to objects covered by the control list. When cultural property is being disposed of by owners to their local institutions, whether by sale or gift, if the disposition is referred to the Review Board and results in the cultural property being certified, the owners can benefit from the tax exemptions if the institution was designated at the time of the disposition.

Thus national treasures less than fifty years old and made by a living person can qualify for the tax exemption. In this way the transfer to the appropriate custodial institutions of objects in the national treasure category of more recent origin, and of whatever provenance, are encouraged before they are subject to the export control provisions of the Act. It also means that outstanding collections and objects, the individual components of which do not meet the minimum values of the control list, are also eligible for tax relief on an aggregate basis.

During the period September, 1977– October 1st, 1980, 119 Canadian collecting institutions were designated for general purposes under the Act and 14 in relation to a specific cultural property. From the applications 14 in relation to a specific cultural property. From the applications received by the review board during this same period, 514 cultural property income tax certificates were issued thereby facilitating the transfer of cultural property to designated institutions evaluated at some 46.2 million dollars.

Estimating Fair Market Value for Income Tax Purposes

It became evident from the first applications for certification received by the Review Board that there was wide variance among Canadian institutions as to the acceptable means for estimating fair market value for donations. Some institutions had established in-house evaluation committees for this purpose against all accepted professional ethics, others associated curatorial staff with the process. Some viewed evaluations obtained for insurance purposes as necessarily synonymous with current fair market value.

When dispositions by gift are concerned, the Review Board has taken the position as a matter of principle that, for all evaluations in excess of $1,000.00, applicants support their estimates of fair market value with appraisals obtained "at arm's length,"

from persons recognized as professionally competent and qualified for this purpose. Particularly in cases where the cultural property is of considerable monetary value, the Review Board has found it prudent to require two "at arm's length" appraisals. However for fine and decorative art, and for archival material, where agencies exist to provide an appraisal which represents the opinion of more than one professional appraiser, one appraisal which represents a combined opinion has been found to be acceptable to the Review Board.

Repatriation of Cultural Property

In addition to the duties specifically assigned to it under the Act, the Review Board makes recommendations regarding the purchase of cultural property situated outside Canada that is related to the national heritage. These grants and loans are made out of monies appropriated annually by Parliament, under the Act.

During the period September, 1977– October 1st, 1980, of the applications for grants received from designated institutions for the repatriation (or "patriation") of cultural property, 75 were determined by the Review Board to meet the conditions of outstanding significance and national importance. As a result grants totalling 2.3 million dollars were issued. It should be noted that the designated institutions involved participated financially to various degrees and the monies voted by Parliament, as intended, have been used to supplement local resources and initiative.

Foreign Cutural Property

There are provisions in the Act which concern the import into Canada of objects illegally exported from foreign states. There has been growing concern in recent years over illicit traffic in cultural property. The bill therefore contains provisions to make it illegal to import into Canada any cultural property illicitly exported from a country with which Canada has a treaty or is party to an international agreement concerned with the prevention of such illicit traffic. Action may be taken in the Canadian courts to recover such property and return it to the country of origin, but innocent purchasers and holders of such property in Canada are protected, for it will not be confiscated and returned to the country of origin until the present owners have been paid a just compensation determined by a Canadian court.

On June 28, 1978 Canada became the 37th member state of UNESCO to accede to the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. The Canadian government believes that the transfer of cultural property from one country to another is no longer a matter of indifference to the community of nations. By implementing the Cultural Property Export and Import Act, it has assumed its responsibility to act as guardian of the heritage of all Canadians, and by acceding to the UNESCO Convention, has taken an important step in recognizing that this reponsibility extends to the cultural heritage of all mankind.

No action has yet been taken to restore cultural property to Canada or to return it from Canada to a reciprocating state under the provisions of this Convention.

Conclusion

The Act, which I have described to you in very general terms, is a "package deal"; it balances controls and restrictions with incentives. As it was devised with the problems of export and import in mind, to be workable it had to be limited to objects in the national treasure category. For those of us involved in defining its scope, our choices were really not that difficult — to try to identify and protect the best.

To conclude, with special reference to the Review Board, I would like to quote from my report in 1978 as Chairman contained in the first annual report made under the Act:

In each of the specific duties of the Review Board under the Act, as well as those carried out at the request of the minister, the communities at interest are implicated in varying degrees. But experience to date has shown just how symbiotic the relationship is between them and just how important it is that these communities manage to work together towards a common interest in the preservation of the heritage, which ultimately is the public interest.

The knowledgeable dealer, the sensitive collector and the dedicated scholar, each in his or her own way a "professional", can bring new dimensions to bear on the most mundane of deliberations. What has been a revelation (and a relief) to the Chairman in the first seven months the Review Board has been in operation is the rapidity with which the members of the Review Board have come to grips with the issues and the surety with which they have invariably achieved unanimity in making their decisions. In the process the Review Board has become a formidable new instrument on the Canadian heritage scene.

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The Council of Europe's Draft Convention on Stolen Art

by Staf Dockx

The purpose of this brief exposition is, in the first place, to point out the Council of Europe's present approach to the problem of art crime and, in the second place, to outline the main features of the draft Convention on the Suppression of Offenses against Cultural Property, which is actually being elaborated by one of its Subcommittees.

The Council of Europe is an intergovernmental organization, founded in 1949 by a group of 10 West European countries. At the moment, it consists of 21 Member-States, which makes it the largest West European regional organization. Membership is open to democratic states. Human rights are by far the most important aspect of the Council's activities. As you may know, one of its greatest achievements was the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950, which led to the institution of the Human Rights Court of Strasbourg.

The aims of the Council of Europe are of a very general nature. Among its purposes is the support of the concept of "common heritage", which as we will see, has been applied specifically to cultural property by the European Cultural Convention, adopted by the Council in 1957.

The Council may pursue these aims through the conclusion of conventions and agreements in economic, social, scientific, administrative matters, and, what interests us here most, cultural and legal matters. Over the last 30 years, the Council has adopted over 100 conventions, agreements and protocols, some of which are of immediate relevance to our subject. We will return to them later.

The basic structure of the Council of Europe is very simple. Its principal organs are the Committee of Ministers and the Consultative Assembly, both of which are served by the same Secretariat. The Committee of Ministers can be considered as the executive of the Council. Its competence coincides fully with the general aims of the Council. The Committee of Ministers can make a choice between two kinds of instruments: either a *convention* or a *recommendation* to the Governments of the Member-States. The difference between these two kinds of instruments is that, as contrasted with conventions, recommendations have no legally binding force. They only derive a certain degree of authority from the rule that they must be adopted unanimously and from the fact that the Governments of the Member-States are under an obligation to report to the Committee of Ministers on the action they have taken — or failed to take — in respect to them.

As far as art crime is concerned, it was felt from the start that a non-binding recommendation would never be effective and that the only realistic approach was the adoption of a convention. In the course of the preparatory works it was, however, suggested that such a convention be supplemented with one or more recommendations dealing with certain matters that are in one way or another connected with art crime. In the fields of cultural and legal matters, there are three standing Committees: the Steering Committee on Crime Problems (usually called the C.D.P.C. after its French name), the European Committee on Legal Cooperation (or C.C.J.) and the Council for Cultural Cooperation (or C.C.C.). The drafting of the Convention for the Suppression of Offenses against Cultural Property has been entrusted to the first of these Committees, the *C.D.P.C.*, whose general competence lies in the field of the prevention of crime and the treatment of offenders. For this purpose, a special Subcommittee was set up in 1977. It is composed of representatives from 10 Member-States of the Council of Europe, including most of the Mediterranean countries, and of observers from a number of international organizations such as UNESCO, ICOM and Interpol. It is hoped that the Convention will be adopted by the Committee of Ministers in September 1981 and to be opened for signature in Athens at the occasion of the 13th Conference of European Ministers of Justice in May or June 1982.

At first sight, it would have seemed more logical to leave the drafting of this convention to the Council for Cultural Cooperation. In fact, the C.C.C. was responsible for drafting the only existing European Convention in this field, namely the European Convention on the Protection of the Archaeological Heritage, which was signed in London in 1969 and entered into force in 1970. The Committee of Ministers has designated a Committee composed of specialists in criminal law because of the Council of Europe's new approach to the question of the protection of cultural property. We might call it the "*ICL-approach*", ICL standing for international criminal law.

In order to be able to understand and appreciate this new approach and to form an idea of its implications — its advantages as well as its limitations — we will try to successively give an answer to the following six questions:
1. What exactly are the contents of the body of legal principles and rules that has come to be known as ICL?
2. How can an ICL-scheme be applied to the protection of cultural property?
3. Why does the Council of Europe prefer the ICL-approach to one focused, for instance, on prevention or on import-export regulations or on the question of bona fide possession?
4. To what extent is the ICL-approach an innovation as compared with the existing conventions relating to the protection of cultural property, in particular the 1969 European Archaeological Convention and the 1970 UNESCO Convention?
5. Is the Council of Europe's new approach strictly limited to the application of ICL-concepts or does it also deal with non-penal matters?
6. How can the ICL-approach, applied to the protection of cultural property within the Council of Europe, be realized through the adoption of a new European convention; what will be the structure and the contents of such a convention; and what will be its relation to the four existing European Conventions dealing with the various forms of international cooperation in criminal matters?

First question: What exactly are the contents of the body of legal principles and rules generally known as ICL? Nowadays, ICL has become a commonly used term. Nevertheless, there are serious differences of opinion among jurists about its exact meaning. Without entering into these doctrinal divergences, we could describe it as a complex set of legal principles and rules which has its roots in both municipal criminal law and international law. It can be conceived of as being composed of two parts which are usually referred to as "adjective ICL" and "substantive or material ICL".

"Adjective ICL" consists of rules which relate to the territorial scope of municipal criminal law, or to

international cooperation in the administration of municipal criminal justice. Practically, it consists of jurisdiction of domestic criminal courts in cases involving a foreign element, and with certain well-established forms of international cooperation in criminal matters, such as extradition, as well as so-called "minor" legal assistance (e.g. the communication betweeen states of information and evidence in criminal proceedings).

The Council of Europe has also developed certain less classical forms of international cooperation in criminal matters, namely: (a) the enforcement in one Member-State of a criminal judgment rendered in another Member-State; (b) the transfer of criminal proceedings from one MemberState to another Member-State and (c) the regulation of plurality of jurisdictions existing between several Member-States. The principle underlying the work of the Council of Europe in this field is that the resources in penal and penitentiary matters existing in its Member-States must be employed in such a way as to ensure their maximum efficiency with a view not only to reducing crime but also to protecting the rights of the individual.

"Substantive or material ICL", is an entirely different matter. The whole basic concept is the notion of "international offense." This refers to a form of behavior which is detrimental to the interests or property of the international community and, as a consequence, must be made punishable at the international level. Punishment is usually effected through the adoption of conventions which have the following features in common: firstly, they qualify as offenses one or more acts committed by individuals; secondly, they give a more or less precise definition of these acts; and thirdly, they impose on the state parties the obligation, if this has not already been done, to penalize these acts, i.e. to write them into their domestic criminal law and to provide adequate penal sanctions for persons committing them. These include provisions aimed at effecting prosecution, i.e. provisions belonging to what we have called "adjective ICL." Conventions of this kind exist in a number of fields such as terrorism, sea piracy, hijacking, protection of submarine cables and pipelines, etc. As we will see, one of the main purposes of the Council of Europe's draft Convention on art crime is precisely to "internationalize" offenses against cultural property, in order to achieve the degree of unification of the domestic criminal law systems of the Member-States required for a smooth and just functioning of the system of international co-operation it intends to create.

Question 2: How can an ICL-scheme be applied to the protection of cultural property?

The general method consists of the following steps:

1. All acts of a criminal nature which are detrimental to cultural property must, at the international level, be listed in a complete schedule. At first sight, this may seem rather easy to achieve. In practice it isn't, because it presupposes that the states involved reach an agreement on two points. On the other hand, each of these acts must be defined in such a way that the definition is compatible with the domestic criminal law of each of the states concerned, and on the other, these states must also agree on a common delimitation of the material scope of such a schedule. In other words, they have to determine, by mutual arrangement, which items can be considered as cultural property worthy of international protection. This involves not only questions relating to the intrinsic cultural value of certain categories of property, but also questions relating to their legal status, e.g. whether both private and public property, or both moveable and immoveable property, should be included.

2. All acts inserted into the schedule must be made part of *substantive ICL*, i.e., all states involved must agree to consider them as offenses having an international character and accept, by way of a convention, the obligation to provide adequate penal sanctions for persons committing them. This is important from a double angle. On the one hand, this internationalization is necessary to ensure that the offenses in question are treated on an equal footing in each of the states concerned, creating a certain unification of the existing municipal criminal law systems. On the other hand, it is the only way to lay the foundations for a coherent and well-functioning system of interstate cooperation in criminal matters. As a matter of fact, the various forms of cooperation I have mentioned are generally subject to theso-called *double criminality standard*, which means that their applicability depends on the question of whether an offense is punishable both in the state where it was committed and in the other state or states which are involved as the result of the presence of a foreign element. Insofar as offenses against cultural property are concerned, this foreign element will usually consist of the conveyance of an illegally obtained item from one country to another. Thus, the unification of municipal criminal law systems must serve to see to it that there exist no loopholes that, in addition to giving the offender an opportunity to go unpunished, would also bar restitution of the illegally exported objects.

3. The different forms of international cooperation in criminal matters I have mentioned must be made applicable to the scheduled offenses against cultural property. But, and this is very important, these mechanisms may not simply be taken over such as they are, in virtue of conventions of a general nature, applied to all offenses without distinction. Where necessary, they must be adapted to the specific characteristics of offenses against cultural property. Furthermore, this technique of adaptation also offers the opportunity to reconsider some of the fundamental conditions to which some of these forms of cooperation are actually submitted. As an example, I could mention the widely accepted rule that extradition or minor legal assistance are not granted for fiscal offenses. Instead of just taking over this rule, one should test the willingness of the states involved to renounce this principle as far as, e.g., the illegal exportation of cultural property is concerned. Finally, the application of the various forms of cooperation to offenses against cultural property would offer the opportunity to try to achieve a certain harmonization by eliminating certain inconsistencies which exist between the legal rules governing the different techniques that are used.

Question 3: Why did the Committee of Ministers of the Council of Europe choose to approach the question of the protection of cultural property through the application of ICL-concepts?

In our present-day society, individual criminal behavior (such as, e.g., theft of works of art, illicit excavation of archaeological objects or illegal

exportation of specially protected items) is by no means the only phenomenon endangering cultural property. There are other equally imminent threats such as the often ruinous effects of industrialization and land or urban development, the sometimes irreparable losses resulting from natural disasters and calamities caused by human negligence and, in some cases, the slow but steady decay of the cultural heritage due to lack of interest in or insufficiency of either funds, legal instruments or man-power for its preservation and development. So, firstly, instead of resolving to tackle, by means of a new convention, the problem of crime in the cultural sector, the Committee of Ministers could just as well have decided to use the Council of Europe's treaty-making machinery to try to improve the situation in one of these other fields. Moreover, even when limiting itself to cultural criminality, the Committee of Ministers could, in theory, have preferred a less direct approach. Instead of emphasizing the strictly penal aspects, it could as well have decided to establish international legal rules of an administrative or civil character relating to certain factors which have a more or less perceptible influence on the occurence of offenses against cultural property, the possibility to detect and prosecute such offenses or the availability of remedies for undoing the effects of illegal appropriation and/or exportation that result from them. As examples of such factors we could mention the rising standard of living and the increasing trend towards collecting works of art and archaeological objects; the growing transnational mobility of persons as well as goods and the gradual pulling down of trade barriers; the absence or inefficiency of protective implements in private houses, religious buildings and even museums, exhibitions and art galleries; the insufficient supervision of archaeological sites; the lack of detailed and comprehensive inventories of cultural property; the slackening of border control; the coexistence of strict export regulations and very liberal import regulations; the divergences between the legal rules of the various countries relating to bona fide possession or acquisition of title, etc.

Although all these factors — and many others — are to a certain extent inter-related, it is obvious that they cannot all be dealt with in a global way, and certainly not in a single international instrument, and that any realistic effort to attain a better protection of cultural property must, of necessity, be limited to one of these aspects at a time, or to a restricted range of closely connected matters. The Committee of Ministers' decision to limit the Council of Europe's new draft convention to international suppression of offenses against cultural property conveyed from one Member-State to another as a result of such offenses must, therefore, be seen as a fundamental option: without underestimating the necessity for parallel international action in related fields, the Committee of Ministers has decided to give priority to the domain of criminal law, and the question of restitution has been envisaged only insofar as it may constitute a remedy for dispossession resulting from criminal acts.

The most decisive reason for this choice was the prior existence of the four European Conventions on international cooperation in criminal matters I mentioned, dealing respectively with extradition, minor legal assistance, enforcement of foreign criminal judgments and transfer of criminal proceedings. As things are, the Member-States of the Council have at their disposal a highly sophisticated network of inter-state cooperation mechanisms that has already proven its practical value. Provided that these techniques are adapted, where necessary, to the specific characteristics of offenses against cultural property, it is hoped that they will become a very efficient weapon in the fight against these forms of criminal behavior.

Now, it has been argued that the existing general Conventions are, in their present form, sufficient to cope with the problem of cultural crime and that a new specific Convention limited to this particular field would either compete with or supersede the existing Conventions, thus creating a plurality of international legal instruments that would be too complex to be workable. This contention, however, can be refuted by pointing out that, in view of the specific nature of offenses against cultural property, some of the existing provisions might turn out to be too general or insufficient while, on the other hand, new specific provisions could be required. Another argument is the far from satisfactory state of ratifications of at least some of the existing Conventions. A special convention — in a limited and to a certain extent rather apolitical field — might be more easily accepted and could even have a positive influence on the ratification of the existing Conventions. In this context, it could be considered as a test-case. A third argument in favor of the adoption of a special convention is that it would, in a more effective way than any other instrument, draw the attention of both the responsible authorities and public opinion to the importance of the fight against criminality in the cultural sector. A fourth argument is that the existing Conventions are mainly focused on the prosecution and punishment of offenders. They contain hardly any provisions relating to the restitution of illegally obtained property, a concern that should be given as much attention, if not more, than actual repression. And a fifth and last argument is that the existing European Conventions on international co-operation in criminal matters strictly belong to what we have called "adjectival ICL." They provide for inter-state cooperation in criminal matters, but only insofar as the offenses in question have been qualified as such in the municipal criminal law of the various state parties. They do not impose on the contracting states any obligation to penalize certain forms of criminal behavior and, as a consequence, they fail to achieve any unification between the existing criminal law systems. The adoption of a new European Convention on art crime, containing a nucleus of "substantive ICL," would be a first step towards realizing such a unification in the limited field of offenses against cultural property.

The second important consideration justifying the Committee of Ministers' option to give priority to the question of criminal acts directed against cultural property is that, in spite of the divergencies that inevitably exist in any field of law between the national legislations of any sizable group of countries, the 21 Member-States of the Council of Europe have municipal criminal law systems largely based on the same fundamental principles and using concepts and definitions that are, if not identical, at least comparable. This is not only the case with regard to

the provisions of their general penal codes which penalize certain criminal acts directed against all property without distinction and which, as a consequence, are equally applicable to such acts when they are committed against cultural property (e.g., provisions relating to theft or receiving). To a lesser extent, the same parallelism exists as far as two other sets of legal rules are concerned: those sections of the penal codes dealing with offenses against cultural property as such (e.g., provisions relating to destruction or damaging of cultural property of a religious or public character), and those penal provisions which appear in national legislation specifically dealing with the protection of cultural property (i.e., laws and regulations relating to archaeology, to the so-called "scheduling" of cultural property and to the exportation of cultural property) and which are intended to penalize certain violations of this legislation.

Precisely because of this relatively close affinity between existing penal provisions, a convention limited to the suppression of offenses against cultural property will, in all likelihood, be more easily accepted by the Member-States than one imposing on them the obligation to revise their existing legal rules relating to other, non-penal, aspects of the protection of cultural property.

To clarify with an example, the majority of the Member-States of the Council of Europe have enacted legislation specifically designed to prohibit or require export authorization for the exportation of certain categories of cultural property from their territory. The nature of this legislation, however, differs from one Member-State to another. Some export regulations are very rigid, not only because they apply to a wide range of categories of cultural property, but because they either simply preclude the exportation of all items belonging to one of the protected categories, or make the export authorizations subject to a cumbersome procedure. Other schemes have a more liberal character, in that both the description of protected cultural property and the licensing procedure provided are intended to see to it that the designated authorities only refuse to issue a license in those cases where the exportation of a given item would constitute an important impoverishment of the cultural heritage of the national community concerned.

In view of these divergencies, it would be difficult to have Member-States accept uniform export regulations. This would not only have to presuppose that, at the level of the Council of Europe, international standards can be estalished in order to determine the criteria to be applied by the national authorities when they have to decide on an export application, but also that all Member-States can be convinced to align to these standards. Such a far-reaching intervention seems hardly feasible, since it would imply a fundamental reconsideration of their cultural, if not commercial, policies. Therefore, an approach limited to the penal aspects of the matter seems to be far more acceptable and, as a consequence, far more realistic. For, in spite of their varying rigor, the export regulations of the various Member-States appear to have at least one feature in common: they practically all contain one or more provisions that make the actual or attempted exportation of cultural property in violation of the established export prohibitions or restrictions punishable as criminal offenses. Without necessitating a complete revision of their existing export regulations, the internationalization, by way of a convention, of these offenses would have, on the one hand, the advantage of resulting in an increased uniformity of the penal sanctions applied to them by the various Member-States; on the other hand, by accepting to grant international co-operation in criminal matters and to allow restitution in respect of them, the Member-States would also be able to effectively tackle those offenses which have effects outside the territory of the state from which the cultural property involved originates.

As far as the exportation of cultural property is concerned, I am convinced that a strictly penal approach would not only be more acceptable, but also much more effective than any other approach. In any case, it would be more effective than the far from satisfactory way in which the authors of the 1970 UNESCO Convention have tried to deal with this question. Article 6 of this Convention imposes on the contracting states the obligation: (a) to introduce an appropriate certificate specifying that the export of the cultural property in question is authorized and; (b) to prohibit the exportation of cultural property from their territory unless accompanied by such a certificate. Now, it is obvious that such measures can only be practically effective on condition that they are supplemented by their logical counterpart, namely a general obligation imposed on each contracting state to prohibit the importation of cultural property not accompanied by an export certificate issued by the contracting state of origin. It is exactly in this respect that the UNESCO Convention remains deficient. The only restriction on the importation of illegally exported cultural property—illegal in the sense of violating the export regulations of the state of origin, not in the sense of being the result of a theft, is the one we find in article 7 (a), whereby the contracting states undertake "to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported...." This rather vague provision clearly fails to alter the presently existing situation wherein the exportation of cultural property in violation of the law of the state of origin is generally not considered as an offense in the state to the territory of which it is illegally conveyed. A penal approach, such as outlined above, would, on the contrary, impose on the "receiving" state the obligation either to prosecute the offender or to extradite him to the state of origin (that is, if he happens to be apprehended on the territory of the former state) as well as, in all cases, the obligation to return the cultural property in question.

Question 4: Can the ICL-approach be considered as innovative as compared with the existing conventions relating to the protection of cultural property, in particular the 1969 European Archaeological Convention and the 1970 UNESCO Convention? The answer to this question is affirmative. Let us first consider the 1969 European Archaeological Convention, which aims at the safeguarding of the scientific value of archaeological objects, by means of the protection of archaeological sites, areas and reserve zones, and the supervision of

transactions with regard to archaeological objects depending on public authorities. It is only logical that most of the obligations imposed on the contracting states lie in the fields of preventive protection, scientific control, and educational and informative action. Surely, one of the considerations underlying the work of the Council of Europe in this field was that illicit excavations are detrimental to the archaeological heritage of the Member-States because they are carried out without scientific method and thus destroy the documentary value of archaeological objects by removing them from their historical context. However, in spite of this consciousness, the authors of the Convention have manifestly underestimated the value of criminal law mechanisms as a weapon in the fight against illicit excavations and the illegal international traffic flowing from it. The only provision dealing with this aspect is a very ambiguous one, article 3 (a), which reads as follows: "To give full significance to archaeological excavations in the sites, areas and zones designated in accordance with article 2 of this Convention, each Contracting Party undertakes, as far as possible, to prohibit and restrain illicit excavations." Assuming that the words "prohibit and restrain" can be read as "punish" — which, to say the least, remains doubtful — the only offense that the contracting states are held to penalize — and only "as far as possible"! — is to carry out unauthorized excavations. None of the provisions of the Convention entails a similar obligation with regard to the trade in or the exportation of archaeological ojects obtained as a result of such excavations or, for that matter, archaeological objects discovered fortuitously or during excavations carried out under license but which have not been declared to the competent authorities. It can be argued that the original intentions were somewhat mitigated in the course of the preparatory work. True enough, in the report that laid the foundations for the Convention, its author, the Italian professor Massimo Pallottino, already accentuated the protection of archaeological sites through scientific control. But he equally devoted a good deal of attention to the problem of illegal traffic and exportation and their repression, an aspect that was, as we have seen, totally neglected in the final text of the Convention.

The 1970 UNESCO Convention hardly pays more attention to the penal aspects of the protection of cultural property. It deals mainly with prevention and restitution and we find only a few provisions relating to the prosecution and punishment of offenses. Article 3 stipulates that "the import, export or transfer of cultural property effected contrary to the provisions adopted under this Convention by the State Parties thereto, shall be illicit." Because of the indeterminate meaning of the term "illicit" this provision cannot be considered as having a clearly penal character. Moreover, the reference to "import, export or transfer of cultural property" is too vague to be useful as a definition of punishable acts. And, finally, article 3 does not impose any clear-cut obligations on the contracting states, but simply refers to their domestic legislation by stipulating that the acts it mentions are only illicit insofar as they are "contrary to the provisions adopted by the State Parties...." The Convention contains only one provision with a distinct penal character: Article 8 stipulates that "the State Parties to this Convention undertake to impose penalties or administrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6 (b) and 7 (b) above." As contrasted to article 3, this provision thus imposes on the contracting states an unmistakable obligation to penalize certain acts directed against cultural property. Yet, what Article 8 has gained in dearness and effectiveness as compared with article 3, it has lost in scope. Indeed, when we examine the two paragraphs it refers to, it appears that this obligation is limited to only two well-specified violations of the Convention: firstly, the exportation of cultural property not accompanied by the export certificate the contracting states must introduce; and secondly, the importation, not of all illegally exported cultural property, but only of cultural property stolen from a museum or a religious or secular public monument or similar institution in the contracting state of origin.

In conclusion, we may say that, by emphasizing the international suppression of offenses in the cultural sector the new European Convention on art crime will introduce a means for the protection of cultural property that has been, hitherto, almost completely neglected by the Council of Europe itself as well as by UNESCO.

Question 5: Is the Council of Europe's new approach strictly limited to the application of ICL-concepts or does it also deal with non-penal matters or, in other words, will the new European Convention on art crime contain provisions concerning certain questions that may be related to the prosecution and punishment of offenses against cultural property, or to their consequences, but that do not belong to the proper domain of (international) criminal law?

The answer to the second part of this question is "yes, but...." I will first try to explain to which matter in particular the "yes" relates and then which restrictions are referred to by the "but."

We have seen that the most important justification for the Committee of Ministers' preference for the ICL-approach is the existence of the four basic European Conventions on international cooperation in criminal matters. But we have also observed that one of the arguments for the thesis that these Conventions are not in themselves sufficient to cope with the question of offenses against cultural property (and that, as a consequence, a special convention is needed in this particular field) is the fact that they pay little or no attention to the restitution of property illegally conveyed from one country to another as the result of a criminal act. It would lead us too far to analyze in detail the provisions of these Conventions dealing with the seizure and handing over of property. Suffice it to say that, in their present form, none of them ensures that the dispossessed owner or the state in violation of whose laws an item of cultural property has been exported can recover the property in question from the person or authority abroad in whose possession it is found. As an example, I could mention articles 3 and 6 of the European Convention on Mutual Assistance in Criminal Matters. The provisions therein do not offer a legal basis for permanent restitution of unlawfully removed cultural property, because they are limited to the seizure and transmittal of articles to be produced in evidence. They do not regard property obtained as the result of an offense as a separate category.

The question of restitution is no more effectively dealt with in the existing conventions specifically

relating to the protection of cultural property. The state party or state parties to the 1969 European Archaeological Convention are merely under the obligation to inform the state of origin of offers suspected of coming either from illicit excavations or unlawfully from official excavations (article 5, sub-paragraph c), to give consideration to questions of identification and authentication raised by the state of origin and "to cooperate actively to the extent permitted by its national legislation" (article 7). The provisions of the UNESCO Convention, too, appear to be of little practical value as far as restitution is concerned, in spite of a principal agreement of the contracting states that one of the means to oppose the illicit import, export and transfer of ownership of cultural property is "to help to make the necessary reparations" (article 2, paragraph 1). We thus observe that, on the one hand, where the provisions apply to the whole range of cultural property such as defined in the Convention and to illegal exportation *lato sensu*, they amount to little more than an expression of goodwill (article 13, sub-paragraph a through d), while, on the other hand, where they impose on the contracting states well-specified (or at least more clearly defined) obligations, their application is limited to only one form of illegal exportation, namely that resulting from the theft of cultural property belonging to public institutions of the state of origin (article 7, sub-paragraph b).

It is precisely in view of this regrettable state of affairs, that the Committee of Ministers has explicitly instructed the Select Committee charged with the drafting of the European Convention on art crime to consider the question of "trans-national restitution," so that we can give an affirmative answer to the question of whether this Convention will deal with non-penal matters.

However, since the Council of Europe's approach is essentially based on the application of criminal law techniques, the question of restitution could not be considered from a very general point of view, but only insofar as it is related to the prosecution and punishment of offenses against cultural property. In essence, the new Convention will make restitution a form of inter-state cooperation linked to or conceived of as a variant of one of the various forms of international cooperation in criminal matters we have mentioned. To summarize the four conditions to which the Convention will submit eventual claims for restitution: 1. the property involved must be cultural property such as defined in the Convention; 2. it must be claimed by one contracting state and exist on the territory of another contracting state; 3. it must have been conveyed from the territory of the former state to that of the latter as the result of an offense against cultural property, such as listed in the Convention, committed on the territory of the former state; and, 4. criminal proceedings must have been instituted in respect to this offense. According to where such proceedings are instituted, restitution will be either an ingredient of extradition or a form of execution of letters rogatory or it will be realized through the enforcement of a foreign criminal judgment ordering restitution.

Question 6: How can the ICL-approach, applied to the protection of cultural property within the Council of Europe, be realized through the adoption of a new European convention; what will be the structure and the contents of such a convention; and what will be its relation to the four existing European Conventions dealing with the various forms of international cooperation in criminal matters?

The first part of this question has already been answered by the replies to some of the previous questions. This is, to a certain extent, also true as far as the two other parts are concerned. Moreover, they almost coincide. We will therefore limit ourselves to describing, very briefly and as a recapitulation, the structure and contents of the draft European Convention on the Suppression of Offenses against Cultural Property, as far as this is permitted by the fact that the preparatory works are not yet completed and that the Select Committee's working documents must be considered as restricted.

The Convention will consist of four major parts, of the first and second of which a preliminary draft is being discussed at the moment.

Part III, of which a preliminary draft text will be worked out at the next meeting of the Select Committee, will deal with the penalization of offenses against cultural property and the question of (extraterritorial) criminal jurisdiction and, on the other hand, with the various forms of international cooperation in criminal matters (extradition, minor legal assistance, enforcement of foreign criminal judgments and transfer of criminal proceedings). Since the discussions on these subjects are still in an early stage, I am not in a position to make any prognostications as to the precise contents of these provisions. The only thing I can say is that, as things are, it is very probable that the provisions dealing with international cooperation in criminal matters will consist of a limited number of concise articles referring to the four existing European Conventions in this field, eventually supplemented by articles designed to adapt some of the existing provisions to the specific characteristics of offenses against cultural property.

Part IV, still to be drafted, can here be left out of consideration. It will contain the usual final provisions relating to ratification, accession, withdrawal and so on, as well as a number of provisions relating to other questions of a merely procedural nature.

Part V presently consists of only two articles, each of which refers to an appendix. The first of these articles contains a definition of cultural property that is largely based on the enumeration used in article 1 of the 1970 UNESCO Convention. But — and this is an important innovation — this definition will not, as is the case in the UNESCO Convention, consist of a single list of categories of cultural property. It will be divided into two parts, an obligatory one and an optional one. The obligatory part will group a limited number of categories of cultural property to which the various provisions of the Convention will *ipso facto* apply in respect to all states that become a party to it, while the optional part will group the remaining categories, to one or more of which each contracting state will have the faculty to declare unilaterally that it wishes to extend the application of the Convention. The second article, then, lists all criminal acts that must be considered as offenses against cultural property. In order to provide for a sufficient degree of flexibility, it has been designed along the same lines as the first article: it will consist of a common schedule and an optional schedule, the first listing a number of offenses such as theft and similar offenses, destruction and

damaging and receiving, the second mainly those offenses relating to archaeology, the scheduling of cultural property and the exportation of such property.

Part II of the preliminary draft is entirely devoted to restitution. In its present form, it contains articles imposing on the contracting states: 1. an obligation to give sufficient publicity to the unlawful removal of cultural property from their territory and the discovery on their territory of cultural property likely to have been illegally removed from the territory of the state of origin; 2. a general obligation to facilitate the restitution of cultural property illegally removed from the territory of the state of origin; 3. the obligation to seize and restitute such property whenever a person prosecuted for or convicted of the offense from which illegal removal results is extradited to the state of origin; 4. the obligation to execute letters rogatory for the purpose of seizure and restitution to the state of origin of cultural property illegally removed from its territory; and 5. the obligation to enforce the part of a foreign criminal judgment ordering the restitution to the state of origin of such property, whether that judgment is rendered by that state or by a third state on the territory of which the property in question has been found.

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The Preservation of Cultural Properties in China

by Shirley Sun

In the early part of the 20th century, a fierce debate raged among Chinese writers, artists, scholars and intellectuals regarding the importance and necessity of preserving traditional values and morals versus adopting new ideas, especially those scientific and technical, to revitalize the moribund tradition. At the time, the Ch'ing empire was near collapse, its territories occupied by European, Russian and Japanese powers, its innermost sanctums violated and the Purple Forbidden Palace in Peking ransacked by Allied forces during the aftermath of the Boxer Rebellion.

Patriotic Chinese attributed the major cause of the nation's decline and weakness to an obsession with its own national and cultural past. For millenia, the collective Chinese psyche had been stuck deeply in the sands of the past. Now, for no other reason than the urgent sake of national survival, China had to wake up to the present if it were to have a future.

The great modern Chinese writer, Lu Hsun, who personified the cultural conscience of China, had written that foreigners preferred to view China as a timeless and unchanging museum, rather than as a living organism. He advocated a selective process of preserving the past, nurturing those elements of tradition which are healthy and discarding those which are detrimental to the growth of China's national well-being. After the establishment of the People's Republic of China in 1949, this debate on cultural values and philosophies extended to the the protection and preservation of cultural properties. The new motto became "Let the past serve the present."

The emphasis was on selective preservation of the past. But what was to be preserved? That was the question and still is.

In the rush toward socialist construction, workers everywhere in different parts of the country came upon ancient old relics. Whether digging wells, building dams, or laying railroad tracks, they turned up important artifacts. During the Hundred Flowers Movement of the late 1950's when varying schools of thought were encouraged to speak out and contend openly in the press, one reader wrote in *Wen Wu* (the *Cultural Relics Journal*):

> We have only some 100 ancient brick structures left that date back to T'ang (618-906 AD.) and pre-T'ang period. Many ancient arches in the cities such as the arch near the Confucian Temple in Peking are now demolished. Many bell towers which were constructed in the center of ancient cities are also being destroyed because of traffic congestion. I don't believe that these historical structures stand in the way of obstructing our new way of life, in fact they enrich our new way of life. As for city walls, many say that they are of no worth at all, and that there is no need to preserve them. However, I believe that although they are made of earth and rubble, they are not without value. Only look at the great Wall of China. Do they not fully represent the creative energies and labors of our ancient forefathers? Thus, the Nanking city wall, and other city walls should be saved. If traffic requires that openings be made in the walls to let the traffic through, then let openings be made.

By the 1950's many of China's cultural monuments, sites and properties were in ruinous states, and in serious jeopardy of extinction, having suffered damages by natural causes and centuries of internecine warfare. During the early part of the 20th century, a staggering number of China's most important relics and objects of art of the first order mysteriously found their way abroad, many of them ending up in European and American museums as well as private collections. A conspicuous example is the Buddhist Caves of Lungmen, in Honan Province, representing some of the finest examples of Chinese religious sculpture from the Northern Wei (386-535 AD) to the early T'ang period. Under the patronage of the Emperor Kao Tsung, some of the most fluid and refined pictorial expressions were created in stone.

At Lungmen, in cave after cave, one is appalled by the sight of hundreds of headless and handless Buddhist

figures. Only the torsos remain, leaving one to imagine the mudra position of their hands. According to Chinese sources, foreign collectors used to select the pieces they wanted by taking pictures of the figures *in situ*, and placed orders with Chinese dealers who arranged to have the specified heads or hands hacked off.

On either side of the entrance of the Ping Yang Cave at Lungmen, were two life-size, marvelously executed processional panels in relief, depicting the Emperor and Empress in gracefully flowing robes, attended by their retinue coming to the shrine. Both panels have been cut away and, in their place are two small photographs of the originals. Below is a statement indicating that one panel is presently in the Metropolitan Museum of Art and the other in the Nelson-Atkins Gallery in Kansas City.

During the Cultural Revolution in the 1960's, China was quite strident in its tone concerning the loss of her art objects and named a number of distinguished Western scholars and museum directors as "cultural imperialists" and "enemies of culture." However, by the 1970's, China had softened her tone considerably. China can afford to be more magnanimous now with the enormous amount of excavation that has been done recently.

Another intriging mystery is the mammoth scholarly undertaking of China's largest encyclopedia, The Great Encyclopedia of Yung Lo. Emperor Yung Lo of the Ming Dynasty had commissioned 148 scholars to design and plan the project. He then collected 2,069 scholars from all over the country and gathered them in the capital in Peking for four years to compile this gargantuan body of knowledge. Hundreds of scholars were employed to hand-copy the text. The first draft of the encyclopedia was completed in 1407. The encyclopedia was initially housed in the Imperial Library. According to Mr. Wang Chi, Director of the Asian Division of the Library of Congress, "No one really knows how the encyclopedia left the country, but somehow during the chaos, and widespread plunder during the Boxer Rebellion, the encyclopedia was taken out of China and found its way to Russia, and to the United Kingdom. In the 20's and 30's, the Library of Congress in the U.S. purchased part of one collection. Since then, China has requested Japan to microfilm parts of the encyclopedia in different parts of the world and a complete set has been reconstructed in reprinted form.

Destruction of cultural properties continued after the estalishment of the PRC, at times due to over-zealousness in politics, and at times, due to violations by local authorities in campaigns to destroy the old. In Hupei province is a complex of Taoist temples, Wu Dan Shan, famed for their thousands Taoist deity figures cast in copper and bronze. In 1955, the Cultural Division of the Country's People Council, using the pretext for collecting waste metal, sent cadres to demolish the deities. The following year, two more waves of destructions took place over the protests and against the warnings of the national policy.

Another complex of hundreds of temple halls was also destroyed in Zhejiang province because of lack of bricks for paving the street. Twelfth century Sung Dynasty stone pagodas were dismantled and used for mending the street. Inside the pagodas were found T'ang Dynasty Buddhist scriptures and paintings, most of which were burnt. One of the cultural cadres managed to save a few pieces during the destructfon. A general cry of outrage arose when information of this reached out. Zheng Zhengduo, the late Vice Minister of Culture, who was a scholar, connoisseur and an avid collector, made a strong appeal to the people. He said that it was insufficient to depend only on cultural cadres and the government for preservation of antiquities. That was too narrow a base. The broad citizenery must be educated to protect China's cultural treasures.

Subsequently, in 1957, Jiangsu province took temporary measures toward finding a remedy. It announced a temporary list of rewards and punishments for the protection and destruction of cultural properties. Among the rewards, it stated that rewards were to be given to those who led to the discovery or the protection of cultural properties individually or collectively. Rewards would be given to those who report a discovery in the process of construction to the Cultural Relics Bureau, and to those who donated cultural objects from their private collections to the state. On the other hand, punishments would be meted out to those who undertook clandestine digs and who willfully destroyed or defaced cultural objects, those who plundered or induced others to plunder or rob graves, those who bought or sold old and rare books without permission, those who engaged in the exchange of precious metals, and those who made rubbings from steles and grave carvings without permission.

Traditionally, rubbings from stone carvings are considered very important cultural objects. Those who made them sometimes deliberately destroyed a few carved Chinese characters or other parts of the design so that others who came later would not be able to make as complete a rubbing.

The period of the Cultural Revolution of the mid-1960's to the mid-1970's was a period of great destruction. Young Red Guards, under the fanatical spell of destroying the 'Four Olds' went tramping across the country. Many museums were shut tight to hide and protect antique objects. However, at the same time, spurred on by the political motivation that ancient objects of art are the examples of the ingenuity of China's laboring peoples, it was also the period of the great activity in archaeology. Some of the most spectacular finds were made during that period. Some of these discoveries were included in the Exhibition of Archaeological Finds from the PRC which travelled to Europe, Canada and the U.S. in 1975-76. Among the magnificent works were jade suits, the 2000 year old bronze flying horse, and golden acupunture needles. Thus China's protection of her cultural treasures seems on two tracks: one is the preservation of existing objects and properties and the other deals with new discoveries.

The Bureau of Cultural Relics was initially under the Ministry of Culture, but the Scope of the Cultural Ministry was too broad, and ranged from modern to folk and the performing arts. So the Bureau of Cultural Relics separated to be on its own, concentrating on the management of museums and excavation sites, in addition to the protection of cultural properties. The Bureau has also centralized into one organization the sale of antiques for export, allowing objects of art under one hundred years old to be sold with a seal indicating that the object has been inspected.

In a country where every inch of available soil is urgently claimed for the cultivation of food for its exploding population, one of the greatest problems facing Chinese archaeologists is the struggle for land as important excavation sites. In 1979, I happened to be taking a walk near the historical Hua Qin Hotsprings on the outskirts of Xian and came upon an incredible neolithic site, Jiang Zhai, which is contemporaraneous to the nearby Ban Po Site. In open pits several feet deep were complete human skeletons dating back more than five thousand years. Buried with them were painted pottery ware and other artificats. Even as I marvelled at this magnificent find, workers were recovering the pits with earth. I was told that the site was too large to be excavated at the present time because of shortage of manpower, and because the land belongs to the farmers in the area and is needed for growing food. Thus, grain was again planted only several feet above an extensive neolithic community.

The archaeological site of the First Emperor Quin Shih Huang which startled the world with the discovery of the 6,000 life-size terracotta warriors and horses, also had to compensate for the land taken away from the farmers. The excavated earth was moved at considerable effort by the Peoples Liberation Army to another location to create more arable land.

Because of the shortage of archaeologists, many para-professionals are trained in short-term courses. Local farmers, high school and university students participate in these courses. Farmers receive work points for their part-time labor at the site. The large area of Emperor Quin's army vault is divided into 27 pits for excavation. Only a fraction of it has been excavated and the warrior figures and horses, restored. Recently, new discoveries of bronze warriors, chariots and horses were found nearby. Such a wealth of archaeological finds will take generations to carry out.

The dangers to the preservation of cultural properties in China today is not so much from illegal plunder or the clandestine export of its objects but from increasing pollution due to industrialization and destruction in the name of modernization, an over-riding national goal. In Xian, the former ancient capital of Changan during the Han and T'ang Dynasties, because of increased housing needs for the growing flux of tourists, a new high-rise hotel is being built which will obstruct the clear view from the Big Goose Pagoda to the Little Goose Pagoda. Since the ancient system of the siting of the pagodas were based on the symbolic use of ritual space and spacial relations, this obstruction destroys not only the aesthetic beauty but the symbolic significance of the pagodas as well. It is a great pity that in order to house the tourists who have come from afar to admire China's ancient culture, the city's ancient architectural planning design is being destroyed. Tighter regulations in city planning are needed so that modernization process and cultural preservation can enhance rather than eliminate each other.

In the next few decades, we can expect to see untold riches in archaeological finds in China. The Chinese are waiting for expertise in the preservation of extremely fragile objects such as ancient textiles and papers. From historical records, they know that precious silk and calligraphy on paper have been buried in the imperial mausoleums, and they need to perfect the skill of preserving these materials before risking them to the dangers above ground. As Chinese archaeologists achieve this knowledge, and as they increasingly interact with their counterparts abroad — after decades of isolation — we will learn a great deal from future finds about the common cultural heritage of mankind.

Shirley Sun, formerly Director of the Chinese Cultural Foundation of San Francisco, was Deputy Director of Public Programs, National Endowment for the Humanities, at the time of this address.

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